

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 93B124

EEOC Charge No.

CCRD Charge No.

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ALICE M. CLAY,

Complainant,

vs.

DEPARTMENT OF INSTITUTIONS,

COLORADO MENTAL HEALTH INSTITUTE AT FORT LOGAN.

Respondent.

The hearing was convened on July 27, 1993. The hearing reconvened on June 29, and July 25, 1994. Respondent appeared at the hearing through Stacy Worthington, assistant attorney general. Complainant, Alice M. Clay, was present at the hearing and represented by D. Dale Sadler, attorney at law.

Respondent called the following employees of the Fort Logan Mental Health Institute ("FLMHI"), to testify at hearing: Judith Callahan, food service manager; Archie Ransom, director of food services; and Gloria Morgan, assistant hospital director of administrative services.

Complainant testified in her own behalf and called the following current or former employees of FLMHI to testify at hearing: Jack Thrasher, baker; Frank Lopez, formerly employed in the food service area; Louisa Lumbano, patients' rights advocate; and Gloria Morgan.

The parties stipulated to the admission of Respondent's exhibits 1 through 36 and Complainant's exhibits A through AA. Respondent's exhibit 37 was admitted into evidence without objection. Complainant's exhibits BB through DD were admitted into evidence without objection.

MATTER APPEALED

Complainant appeals her termination from employment.

ISSUES

1. Whether Complainant established a prima facie case of discrimination or retaliation.
2. Whether Complainant received employee performance ratings of "needs improvement" in October, 1992, and January, 1993, because of Complainant's failure to communicate with her supervisors and because of Complainant's inability to work harmoniously with co-workers.
3. Whether Complainant's actions constituted a failure to comply with standards of efficient service and unsatisfactory job performance in violation of Board Rule R8-3-3(c)(1).
4. Whether the appointing authority's decision to terminate Complainant's employment was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant Alice Clay was employed as a food service worker B at FLMHI. Clay began her employment with FLMHI in September 1986. Clay continued her employment as a food service worker until March 5, 1993, when her employment was terminated for failure to comply with standards of efficient service and

unsatisfactory job performance.

2. Clay worked under the supervision of Judith Callahan and Jack Abramson, food service managers, and Archie Ransom, the director of food services. The appointing authority for Clay's position is Gloria Morgan, assistant hospital director of administrative services.

3. The food services section provides food service to the mental health institute, preparing 250 meals, three times per day, 365 days per year. Approximately, 30 employees are employed in the food service section from 5 a.m. to 7 p.m. each day. The food service director, managers and the cooks I, II, and III exercised supervisory authority over Clay as a food service worker during her employment.

4. Clay's job duties required her to perform numerous duties related to food preparation and service. All employees in the food service area are required to be flexible in the performance of their duties and to work cooperatively with other workers. Callahan prepares job descriptions on a routine basis describing the duties performed by workers in the food service section. The job description define the time to be taken in the performance of the assigned duties.

5. Despite the specificity with which the duties of the food service workers are defined, the workers are required to perform additional duties as needed. In this regard, Clay, and the other workers, were expected to be flexible and to accept the direction of supervisors in order to fulfill the responsibilities of the food service section.

6. Clay received yearly performance evaluations during her employment in the food service area. During the performance rating periods from October, 1987, to September, 1988, and October, 1988, to October, 1989, Clay received a "standard"

rating. Clay's supervisor, Callahan, noted on the ratings that areas of development for Clay were in her "Relationship with People" and in the area of "Work Habits". Clay was recognized by Callahan and her co-workers as an individual who performed her job duties competently. However, she had difficulty getting along with her co-workers and supervisors, and this characteristic got in the way of her job performance.

7. Clay's supervisors made efforts to determine the source of the conflict in Clay's relationship with her co-workers and supervisors. In 1989, Callahan sought the assistance of the State's mediation program. Clay and Callahan met with a professional mediator weekly or bi-monthly for a period of six months.

8. During the rating period from October, 1990, to October, 1991, rating standards changed in the state system, and Clay received a "good" rating. While Clay's overall rating was "good", Callahan noted that Clay needed development in the area of interpersonal relations and time management. During this period, because of Clay's supervisors' continued belief in her value as an employee, Clay was granted administrative leave to attend counselling sessions at the Colorado State Employees Assistance Program ("C-SEAP") in 1990 and 1991. The objective of the counselling was to assist Clay in improving her interpersonal relationships.

9. Clay received a performance rating covering the period from October, 1991, to October, 1992. Clay received a rating of "needs improvement". Attached to the performance evaluation was a lengthy narrative enumerating the areas of her job performance in need of improvement. The narrative notes that Clay's supervisors received numerous complaints from co-workers about Clay's communications skills and attitude. The narrative further notes that Clay's job performance deteriorated in the area of her ability to work and communicate with others, that Clay refused to

participate in productive supervisory meetings and that Clay had many confrontations with supervisors. The performance rating narrative provided examples of Clay's failure to perform in the areas of organizational commitment and adaptability, communication and interpersonal relations.

10. Callahan based her assessment of Clay's job performance on her personal observations of Clay and based on the comments of co-workers. Clay was rigid in her work habits. When Callahan deviated from the job description given to Clay, Clay would refuse to perform the tasks assigned.

11. With the October, 1992, performance rating, Clay received a corrective action and performance plan. Clay was directed that she had a 90 day period in which to improve her job performance in the areas of organizational commitment and adaptability, communication and interpersonal relations. Clay was specifically instructed to respond cooperatively to changes in policies and procedures, communicate in an effective and courteous manner and maintain a cooperative working relationship with co-workers.

12. Clay grieved the October, 1992, performance rating and corrective action. Clay met with Archie Ransom on October 7, 1992, to consider the issues raised by her grievance at step II. A resolution of several of Clay's concerns was reached during the meeting. However, the issues related to the "needs improvement" performance rating and the corrective action were not resolved. Ransom refused to removed the performance rating or the corrective action, and directed Clay to adhere to the 90 day performance plan.

13. Ransom was called upon on a routine basis to attempt to mediate disputes between Clay and her co-workers and supervisors. Generally, the mediation efforts took the form of informal meetings with Callahan and Clay. Ransom found that she could never work out an agreeable solution for Clay. Clay continued to

refuse to work with her supervisors. Clay was not willing to be conciliatory, did not accept responsibility for the problems and continued to create discord in the work place.

14. On November 5, 1992, an incident occurred during the corrective action period when Clay failed to properly prepare food carts. The carts did not contain enough jello portions, there was a delay in loading the carts and a tossed salad was not made for the evening meal. Callahan attempted to meet with Clay about her handling of the food carts. During the meeting, Clay was insubordinate and refused to engage in any meaningful discussion of the issues. Clay blamed her co-workers, and was angry and uncommunicative with Callahan.

15. Callahan noted the incident in a memorandum addressed to Clay. Callahan instructed Clay in the memorandum that she was expected to discuss work related problems with her in an agreeable manner. On December 1, 1992, Clay filed a grievance. She alleged in the grievance that Callahan's account of the incident in the November 1992 memorandum was untrue. Clay further maintained that Callahan was incorrect in referring to her as a individual with a behavior problem.

16. Clay's grievance was considered by Gloria Morgan at Step III of the grievance process. The end of the 90 day corrective action period was approaching when Morgan reviewed the grievance. Morgan extended the corrective action period in order to provide additional time to consider the grievance. The corrective action period was extended to January 26, 1993.

17. Following a meeting between Clay and Callahan on January 14, 1993, at which Clay's job performance during the corrective action period was discussed, Clay received another "needs improvement" performance rating. She received the rating on January 28, 1993.

Clay's job performance during the corrective action period had continued to deteriorate. She did not improve her job performance

in any of the areas noted in the October, 1992, performance rating and corrective action. Clay maintained a confrontational attitude with co-workers and supervisors. Clay further failed to exhibit flexibility in the performance of her job duties.

18. During the corrective action period, Clay's supervisors were engaged in continuous communication with Clay about her job performance. Three memorandums were written to Clay by her supervisors because of Clay's insubordination and disruptive behavior. Clay filed three grievances which were addressed by her supervisors through the grievance process. Clay met with Ransom, Abramson and Callahan on nine occasions to discuss job performance issues. And, co-workers registered two complaints against Clay for job performance problems.

19. Following the second "needs improvement" performance rating in January, 1993, Morgan decided to meet with Clay for a Board Rule R8-3-3 meeting. At this meeting, Clay offered no explanation for her failure to perform at a "standard" or above level. She maintained the an employee is never found to be right when challenging the authority of their supervisor. She accepted no responsibility for her actions which created a hostile working environment.

20. Morgan inquired of Clay at the R8-3-3 meeting whether she believed that she should be demoted or terminated from employment. Morgan maintained that under Board Rule R8-2-5, these were the options available, since Clay received two "needs improvement" performance ratings. Clay offered no input on this subject.

21. Morgan concluded that a demotion to a food service worker A position would result in Clay being required to work even more closely with her supervisors. Since the conflict occurring between Clay and her supervisors was the primary source of the "needs improvement" rating, Morgan concluded that a demotion was not acceptable.

22. Morgan concluded that her remaining choice of action with regard to Clay's employment was to terminate it. Morgan did so, effective March 5, 1993. Morgan met with Clay to advise her of the decision.

DISCUSSION

A certified employee may be disciplined only for just cause as specified in Article XII, Section 13(8) of the Colorado Constitution. Colorado Association of Public Employee v. Department of Highways, et.al., 809 P2d 988 (Colo 1991). The burden of proving by a preponderance of the evidence that just cause exists for the discipline imposed rests with the appointing authority. Section 24-4-105(7), C.R.S. (1988 Repl. Vol. 10A). The Board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B).

Board Rule R8-2-5(A) provides direction to the appointing authority with regard to the action that may be taken against an employee when there has been a protracted period of poor job performance.

The rule states,

Employees performing at an overall level of Needs Improvement shall be given a corrective action for the initial needs improvement rating and afforded a period of time to improve performance as provided in R8-3-2(B). If when reevaluated, the employee's rating is Needs Improvement or Unacceptable, such rating is the basis for disciplinary action. Following an R8-3-3 meeting, absent extraordinary circumstances, the employee shall be dismissed or, at the discretion of the appointing authority, demoted if the employee has demonstrated

competence at a lower level.

Respondent argued that it established by a preponderance of the evidence that Complainant failed to perform her job duties at an acceptable level. Respondent argued that it established that efforts were made to counsel Complainant in order to assist her in improving her job performance, but that these efforts were to no avail. Respondent contends that under R8-2-5, it had two options available to it when Complainant received two "needs improvement" ratings. Respondent maintains that Complainant could only be demoted or dismissed.

Respondent argues that it was neither arbitrary, capricious nor contrary to rule or law to decide to terminate Complainant's employment. It is Respondent's position that ample evidence was presented to establish that Complainant could not be expected to perform her job duties at the food service worker A level any better than she performed duties at the B level. Respondent relied on the fact that the A level required Complainant to work even more closely with her supervisors than she had at the B level. Since Complainant's primary job performance problems related to her confrontational and uncooperative manner of dealing with her supervisors, Morgan decided that demoting her to the food service worker A level was not an option available to her.

Ruling out the option to demote Complainant, and absent any extraordinary circumstances, Morgan decided to terminate Complainant's employment. Since this action is consistent with the direction found in R8-2-5, Respondent argues that it should be sustained.

Complainant maintains that she established that Morgan's decision to terminate her employment was arbitrary, capricious and contrary to rule or law. Complainant contends that the decision to terminate her was retaliatory "with racial overtone". Complainant maintains that she performed her job duties competently and that

it was only because of Callahan's harassment and retaliation that she was terminated from employment with Respondent.

Complainant presented no evidence to sustain her burden to establish that Respondent's decision to terminate her employment was discriminatory or retaliatory. Respondent presented ample evidence to sustain its burden to establish that during the rating period from October, 1991, to October, 1992, and during the corrective action period from October, 1992, to January, 1993, Complainant's job performance needed improvement.

The evidence established that through the relevant performance rating period, Complainant was belligerent, confrontational and hostile. The evidence further established that as early as 1989 notations were made about Complainant's need to improve her job performance in the area of interpersonal relationships. The evidence further established that Complainant's supervisors attempted to use the State's mediation program and C-SEAP counselling for Complainant in order to ascertain the source of conflict between Complainant, her supervisors and co-workers, and in order that resolve the conflict. These effort prove to be to no avail, since Complainant's job performance continued to deteriorate during the performance rating period at issue here.

Board Rule R8-2-5 allows the appointing authority to consider the demotion of an employee who receives two "needs improvement" ratings. Morgan consider this option at the R8-3-3 meeting with Complainant. Complainant could offer Morgan no reason why she should believe that Complainant's job performance would improve following a demotion. In the face of the information Morgan had, and in light of Morgan's knowledge that Complainant refused to accept responsibility for her actions, it was neither arbitrary, capricious or contrary to rule or law to decide to terminate her employment.

CONCLUSIONS OF LAW

1. Complainant failed to establish any evidence that the decision to terminate her employment was retaliatory or discriminatory.

2. Respondent established by a preponderance of the evidence that Complainant failed to perform her job duties competently during the rating periods from October, 1991, to January, 1993.

3. Respondent established that Complainant's conduct constituted a failure to comply with standard of efficient service and unsatisfactory job performance in violation of Board Rule R 8-3-3(c)(1).

4. The decision to terminate Complainant's employment was neither arbitrary, capricious or contrary to rule or law.

ORDER

The action of the Respondent is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 8th day of
September, 1994.

Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the 8th day of September, 1994, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

D. Dale Sadler
Attorney at Law
5000 S. Quebec St., Ste. 620
Denver, CO 80237

and in the interagency mail, addressed as follows:

Stacy Worthington
Assistant Attorney General
1525 Sherman St., 5th Fl.
Denver, CO 80203